JUL 30 1945

IN THE

Supreme Court of the United States

October Term, 1944.

No. 1373.

STANDARD LIME AND STONE COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

REPLY BRIEF

SUPPORTING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

HARRY N. BAETJER,
VENABLE, BAETJER & HOWARD,
Baltimore, Maryland.

LACY I. RICE,
RICE & HANNIS,
Martinsburg, W. Va.
Attorneys for Petitioner.

King Bros., Inc., Printers, 208 N. Calvert Street, Baltimore, Md.

In The

Supreme Court of the United States

October Term, 1944.

No. 1373.

STANDARD LIME AND STONE COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

REPLY BRIEF

SUPPORTING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

THIS COURT'S RECENT DECISION IN HILL V. FLORIDA.

At pp. 6-7 of the petition for writ of certiorari, and at pp. 5, 18-20 of the supporting brief, we presented as an important question of federal law which has not been, but should be, settled by this Court, the following question:

Where the National Labor Relations Board holds an election with each of two unions and "Neither" on the ballot, with the result that neither of the unions nor "Neither" receives a majority of the votes cast, with "Neither" running third; and the Board eliminates

"Neither" from the ballot and holds a so called "run off" election between the two unions, does the Board's elimination of "Neither" from the ballot make the second election, and the Board's certification of the union based thereon, invalid?

We pointed out that when the Board eliminated "Neither" from the ballot at the second or run off election, the Board made a decision for the employees which the employees were there to decide for themselves.

The Board's elimination of "Neither" from the ballot disregarded the fact that, because of an elected union's power by a closed shop agreement to force members of a rival union to change affiliation, supporters of one union might very well prefer to vote for no union than to risk the election of a rival union. The employees should have been permitted to decide at the ballot box whether they preferred "Neither" to a run off vote later between the two unions. The statute contemplates an election by the employees, not an election partly by the Board.

As shown at pp. 11-16 of the Board's brief in opposition to certiorari, its only reply is that although up to 1940, the Board would have considered itself in error if in this situation it had eliminated "Neither" (see the Board's brief, p. 12), nevertheless, in the Board's "considered judgment," as a result of its "wide experience," and as an outgrowth of its "practical experience," the Board now thinks that its elimination of "Neither" was proper because Sec. 1 of the Act declares a policy "to encourage" collective bargaining.

Since our petition and brief were printed, this Court has rendered its decision in *Hill v. Florida*, 65 S. Ct. 1373, where Florida's regulation of labor union activities was held improper as in irreconcilable conflict with the collective bargaining regulations of the National Labor Rela-

tions Act; and in so holding, this Court has certainly construed the Act to require elections by the employees, not partly by the employees and partly by the Board (see p. 1374):

> "* * * The declared purpose of the Wagner Act, as shown in its first section, is to encourage collective bargaining, and to protect the 'full freedom' of workers in the selection of bargaining representatives of their own choice. To this end Congress made it illegal for any employer to interfere with, restrain or coerce employees in selecting their representatives. *Congress attached no conditions whatsoever to their freedom of choice in this respect. Their own best judgment, not that of someone else, was to be their guide.* 'Full freedom' to choose an agent means freedom to pass upon that agent's qualifications." (Italics ours.)

And in his opinion partially dissenting, Mr. Chief Justice Stone was clearly of the same opinion (see p. 1376):

> "* * * The fact that the National Labor Relations Act imposes sanctions on the employer alone does not mean that it did not, by Sec. 7, confer the right on employees as against others as well as the employer to make an uninhibited choice of their bargaining agents. Cf. United States v. Hutcheson, 312 U. S. 219, 61 S. Ct. 463, 85 L. Ed. 788. Section 7 confers the right of choice generally on employees and not merely as against the employer."

Now that this Court has spoken, it is even clearer that the Board's elimination of "Neither" cannot be justified because Section 1 of the Act declares a policy to "encourage" collective bargaining. "Encourage" does not mean to force; it does not mean to override the employees' wishes, or to guess at their wishes when they are there to vote on it themselves.

CONCLUSION.

We submit that for the reasons stated in our petition, brief and reply brief, the petition for writ of certiorari to the Circuit Court below should be granted.

Respectfully submitted,

HARRY N. BAETJER,
VENABLE, BAETJER & HOWARD,
Baltimore, Maryland.

LACY I. RICE,
RICE & HANNIS,
Martinsburg, W. Va.
Attorneys for Petitioner.